Defending Search Warrants   
Affirmative Brief by Alisa Stringer



In a resolution about privacy in criminal procedure, search warrants are naturally a fundamental aspect of the debate. The United States warrant system provides a clear and simple application for judges, most of whom are quite familiar with the Fourth Amendment.

Depending on the specifics of the case, search warrant applications can be used on either side of the resolution. Therefore, it can be frustrating when debaters attempt to claim that search warrant applications are non-resolutional. The argument typically goes something like this:

My opponent has presented an application concerning search warrants. The affirmative claim is that the search warrant system suggests that privacy is rightly limited by the search for truth, and when a search warrant is issued the courts are valuing truth-seeking over privacy. (Or, when negatives run the argument: Their claim is that a search warrant wrongly violates privacy in the search for truth.) My response is that search warrant applications are non-resolutional. Once a search warrant is issued, the individual whose property is searched has lost their right to privacy. Because the search warrant application does not present the conflict that the resolution requires the search warrant application has no impact on the debate.

The following brief prepares a response to the argument that search warrant examples have no bearing on the resolution. While this brief was initially prepared for affirmative use, it can be applied to either affirmative or negative arguments at the debater’s discretion, because it counters a question of resolutional applicability. The information provided is directed toward two major counter-arguments.

The first four arguments assume that the debater using this brief believes that the resolution refers to a natural right to privacy. If this is true, then a person can lose their legal right to privacy, but if their natural right is intact then the application is resolutional.

Arguments five through eight focus on the claim that the conflict needed for the resolution is found in the issuing of the warrant. The very existence of warrants is dependent on a conflict with privacy. When a warrant is issued, the courts are choosing truth-seeking, making warrant applications some of the clearest examples of the resolution in progress in the real world.

The tags used in this brief include:

1. Legal versus Moral Rights
2. Laws Do Not Determine Morality
3. Natural Right to Privacy (Not Removed by Circumstance)
4. Privacy is an Extension of the Natural Right to Property
5. The Warrant Requirement Proves Privacy in Play
6. The Fourth Amendment Balances Privacy and Truth
7. Warrants Only Exist in Contrast to Privacy
8. Search and Seizure Conflicts with Privacy

Defending Search Warrants

Legal versus Moral Rights

“Understanding the Tools - Moral Rights: Theoretical Background” SMU, Accessed 12/30/18. https://www.smu.edu/Provost/Ethics/Resources/EthicsToolBox/UnderstandingtheTools/MoralRightsTheoreticalBackground

We must, of course, distinguish between moral rights and legal rights. Slaveholders in the antebellum South had legal property rights in their slaves: legally, their slaves were their property. But it does not follow that they had any moral property rights in their slaves: morally, their slaves were not property, but rather free and equal beings. Perhaps less obviously, we must also distinguish between rights that are recognized or enforced and those that are not. Slaves in the antebellum South had moral rights to liberty and equality that were neither recognized nor enforced, either by the law or by the conventional morality of the antebellum South.

Laws Do Not Determine Morality

Tommaso Pavone. “The Philosophy of Law Outline.” Princeton, Spring 2015. https://scholar.princeton.edu/sites/default/files/tpavone/files/philosophy\_of\_law\_outline.pdf

5. The distinctions between morality and law

1. Laws are often less important than morals: “In contrast with morals [...] some, though not all, rules of law, occupy a relatively low place in the scale of serious importance. They may be tiresome to follow, but they do not demand great sacrifice”
2. Laws can be changed by deliberate enactment: “By contrast moral rules or principles cannot be brought into being or changed or eliminated in this way”
3. Legal responsibility cannot be evaded by an inability to act: “by contrast, in morals ‘I could not help it’ is always an excuse, and moral obligation would be altogether different from what it is if the moral ‘ought’ did not in this sense imply ‘can’.”
4. Laws are exerted by threats or appeals to interest: Whereas moral pressure is exerted “by reminders of the moral character of the action contemplated of the demands of morality.”

Natural Right to Privacy (Not Removed by Circumstance)

*Catherine M. Barrett, “FBI Internet Surveillance: The Need for a Natural Rights Application of the Fourth Amendment to Insure Internet Privacy”, 8 RICH. J.L. & TECH. 16. Spring 2002.* [*http://www.jolt.richmond.edu/v8i3/article16.html*](http://www.jolt.richmond.edu/v8i3/article16.html)*.*

In Epstein introduces privacy rights grounded in natural rights jurisprudence as a superior approach to evaluate questions arising from the use of increasingly advanced technologies because it focuses on the act of communication, rather than focusing on the means or content of communication.[102] As already noted, natural rights jurisprudence is grounded in the premise that individuals, because they are natural beings, have certain inherent rights. Therefore, individual privacy is not a subjective expectation that leads to the belief that there is a “right to privacy;” rather, it is fundamental that every human being has certain natural rights, chief among them the right to be secure in one’s own thoughts, words, and actions, so long as they do not infringe on the rights of others or harm others. Epstein rejects the notion that privacy rights are created by the state and says that, “rights are justified in a normative way simply because the state chooses to protect them, as a matter of grace.” [103] To illustrate the point, Epstein notes “a common example of personal liberty is that the state should prohibit murder because it is wrong; murder is not wrong because the state prohibits it.”[104]

Privacy is an Extension of the Natural Right to Property

David Fillingham. “6.805/STS085: Listening in the Dark - Wiretapping and Privacy in America.” Paper for MIT 6.805/STS085: Ethics and Law on the Electronic Frontier, Fall 1997. <http://groups.csail.mit.edu/mac/classes/6.805/student-papers/fall97-papers/fillingham-wiretapping.html>

In his Two Treatises of Government, John Locke carried forward this idea of "privacy as an extension of property." He describes a natural state of man, in which private property rights are endowed from God, and should therefore be protected from intrusion by the Government [2]. According to this line of thought, one has a right to expect the government to refrain from intrusion into your home for the same reason the Government does not have a right to simply take your home away - the house and the land it sits on are "private" property. Locke’s thoughts were also important in the privacy debate for another reason - it was he who first constructed the argument that governments are set up among the population of a society to preserve natural rights - and that if a government ceases to uphold these rights, then the people are morally justified in overthrowing the government. These thoughts, of course, find their way into our own Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it..." [3]

The Warrant Requirement Proves Privacy in Play

Cameron F. Kerry “Why protecting privacy is a losing game today—and how to change the game.” Brookings Institute, July 12, 2018.

https://www.brookings.edu/research/why-protecting-privacy-is-a-losing-game-today-and-how-to-change-the-game/

The Supreme Court in its recent Carpenter decision recognized how constant streams of data about us change the ways that privacy should be protected. In holding that enforcement acquisition of cell phone location records requires a warrant, the Court considered the “detailed, encyclopedic, and effortlessly compiled” information available from cell service location records and “the seismic shifts in digital technology” that made these records available, and concluded that people do not necessarily surrender privacy interests to collect data they generate or by engaging in behavior that can be observed publicly. While there was disagreement among Justices as to the sources of privacy norms, two of the dissenters, Justice Alito and Gorsuch, pointed to “expectations of privacy” as vulnerable because they can erode or be defined away.

The Fourth Amendment Balances Privacy and Truth

“The Interest Protected.” Justia, Accessed 12/31/18.

https://law.justia.com/constitution/us/amendment-04/03-the-interest-protected.html#fn-36

The Court later rejected this approach. “The premise that property interests control the right of the government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”36 Thus, because the Amendment “protects people, not places,” the requirement of actual physical trespass is dispensed with and electronic surveillance was made subject to the Amendment’s requirements.37 despite global price crashes.

Warrants Only Exist in Contrast to Privacy

“Fourth Amendment.” Cornell Legal Information Institute, Accessed 12/30/18.

[*https://www.law.cornell.edu/wex/fourth\_amendment*](https://www.law.cornell.edu/wex/fourth_amendment)

The Fourth Amendment of the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The ultimate goal of this provision is to protect people’s right to privacy and freedom from unreasonable intrusions by the government. However, the Fourth Amendment does not guarantee protection from all searches and seizures, but only those done by the government and deemed unreasonable under the law. To claim violation of Fourth Amendment as the basis for suppressing a relevant evidence, the court had long required that the claimant must prove that he himself was the victim of an invasion of privacy to have a valid standing to claim protection under the Fourth Amendment. However, the Supreme Court has departed from such requirement, issue of exclusion is to be determined solely upon a resolution of the substantive question whether the claimant's Fourth Amendment rights have been violated, which in turn requires that the claimant demonstrates a justifiable expectation of privacy, which was arbitrarily violated by the government.

Search and Seizure Conflicts with Privacy

Sergeant Marcus Paxton. “Warrantless Searches.” Criminal Justice Institute, November 5, 2003. <https://drinks.seriouseats.com/2012/05/what-is-fair-trade-coffee-why-you-should-buy-fair-trade-certified.html>

The concept of “seizure” is less clearly defined than the concept of “search.” Early on, the Courts usually spoke of “search and seizure” without separating the two. (Joseph 2002) A person is seized when a reasonable person in his position would believe he was not free to terminate the encounter and go about his business due to physical force applied by government or by an assertion of authority to which the person submits. Real property is seized when government meaningfully interferes with one’s possessory interest in it. An intangible is seized either when a copy of it is obtained or the content discovered through purposeful governmental activity that invades a reasonable privacy interest of meaningfully interferes with one’s possessory interest in it. (Joseph 2002) As an Officer, you are able to seize persons, real property and intangible items if you have a warrant or under conditions that you do not need a warrant. So “search and seizure” could be defined as the government invading a person’s expectation of privacy to interfere with one’s possessory interest in a person, real property and/or intangible items. 8 Now that we know the definition of search and seizure, we can proceed to the warrantless exceptions involving search and seizure. (Joseph 2002) Chief Promise of Fair Trade Coffee: Reduce Poverty (not lived up to)